IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 758

HOLLYWOOD CIRCLE, INC., a corporation,

Petitioner and Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; RUSSELL S. MUNRO, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; PHILIP E. DAVIS, AREA ADMINISTRATOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Defendants and Respondents.

PETITIONER'S REPLY BRIEF.

ROBERT M. MASLON,
ALBERT E. ISENBERG,
DON LOMPA, and
RONALD H. FREEMONT,
301 City National Bank Bldg.
304 North Rodeo Drive,
Beverly Hills, California

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Defendants and Respondents.

PETITIONER'S REPLY BRIEF.

Pursuant to leave of Court first and obtained, petitioner does hereby file its reply brief in this cause.

I.

The Petition for Writ of Certiorari in This Cause Was Timely Filed.

A. Statement of Facts Relating to Filing of Petition.

The District Court of Appeal of the State of California affirmed the judgment of the lower court in this cause on September 3, 1957. The District Court denied a rehearing

on September 25, 1957. The Supreme Court denied a hearing on October 30, 1957. Under the Constitution of the State of California, Article VI, Section 4c, the judgment of the District Court of Appeal became final sixty days after September 3, 1957, on November 2, 1957. The remittitur issued from the District Court of Appeal on November 4, 1957.

The petition for writ of certiorari was filed on January 30, 1958.

B. The Finality of Judgments of the District Court of Appeal of the State of California Is Governed by the Constitution of the State of California.

The California Constitution, Article VI, Section 4c, provides as follows:

> "The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a district court of appeal and to order any cause pending before a district court of appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district court of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced.
>
> "The Supreme Court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal for another district, or from one division thereof to another for hearing and decision."

In accordance with the constitutional provision, a decision of the District Court of Appeal of the State of California, only becomes final upon the expiration of a period of sixty days from the date it is filed. The decision does not become final as to the rights of the parties until after the expiration of this period, whereupon the remittitur issues.

Scoville v. Keglor (1938), 29 Cal. App. 2d 66, 67, 84 P. 2d 212;

People v. Walker (1926), 76 Cal. App. 192, 200, 244 Pac. 94.

C. Decisions of the Supreme Court of the State of California Are Governed by Rules on Appeal and Become Final Thirty Days After Filing.

The California rules on appeal expressly provide that a decision of the Supreme Court of the State of California becomes final thirty days after filing unless otherwise ordered prior to the expiration of said thirty-day period.

Rule 24(a), Rules on Appeal of the Supreme Court and District Courts of Appeal of the State of California, effective July 1, 1943. (See 22 Cal. 2d 1.)

Amendments to Rules on Appeal adopted by the Judicial Council of the State of California, effective January 1, 1957. (See 47 Cal. 2d 1.)

There is no provision in the Constitution of the State of California applicable to decisions of the Supreme Court comparable to Article VI, Section 4c, which applies to the District Courts of Appeal.

Rule 24(a) states the time when decisions of the reviewing courts become final. This rule is complicated by the partial coverage of the Constitution which establishes

a difference between the rules applicable to the Supreme Court and District Courts of Appeal.

For discussion of this difference in the rules, see Witkin, New California Rules on Appeal (1944), 17 So. Calif. L. Rev. 248, *et seq.*

In view of the application of the Constitution as to finality of decisions solely to the District Courts of Appeal, petitioner, on November 22, 1957, wrote to the Clerk of the Supreme Court, requesting the date on which the decision in this cause became final. A copy of petitioner's letter is attached hereto marked Exhibit "A" and made a part hereof by reference.

The Clerk of the Supreme Court replied on November 25, 1957, advising that the decision of the District Court of Appeal became final sixty days after September 3, 1957. The Clerk did not advise as to when the ninety-day period to file the petition for writ of certiorari expired. A copy of said letter is attached hereto marked Exhibit "B" and made a part hereof by reference.

It should be noted that as stated by the Clerk of the Supreme Court of California, this case never became the Supreme Court's case. The final decision in this case was that of the District Court of Appeal, which under the Constitution of the State of California became final on November 2, 1957. The petition for writ of certiorari was filed on January 30, 1958, within the ninety-day period. The denial of a hearing by the Supreme Court on October 30, 1957, does not affect the constitutional provision requiring the expiration of sixty days to make the decision of the District Court of Appeal final. The Supreme Court has the right, within said period, to reverse itself and order a hearing.

D. The Decision of the District Court of Appeal Was Not a "Final Judgment" Within the Meaning of the Judicial Code, Section 237 (28 U. S. C., Sec. 344(a)), Until the Expiration of Sixty Days From the Date of Filing.

The decisions of the courts of the State of California disclose that judgments of the district courts of appeal do not become final until the expiration of thirty days after the same have been pronounced or filed.

Moran v. District Court of Appeal (1940), 15 Cal. 2d 527, 102 P. 2d 1079;

People v. District Court of Appeal (1924), 193 Cal. 19, 222 Pac. 353.

In *Market Street Railway Co. v. Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770, the court reviewed Rule 24(a) as applied to decisions of the Supreme Court of the State of California. The Supreme Court had rendered a decision and had denied a rehearing in that case. Rule 24(a) was clearly applicable. The court did not consider, however, the effect of the Constitution of the State of California as applied to decisions of the District Courts of Appeal. No such action was involved.

Petitioner submits that this case never became the Supreme Court's case, and that, therefore, the final decision is that of the District Court of Appeal. That decision became final under the Constitution of the State of California on November 2, 1957.

Petitioner relied upon the Constitution of the State of California and upon the advice of the Clerk of the Supreme Court that the decision of the District Court of Appeal became final after sixty days in filing this petition for writ of certiorari on January 30, 1958. Respondents have

not questioned the timely filing of petition for writ of certiorari in their opposing brief. Petitioner submits the petition was timely filed.

II.

Reply to Respondents' Statement of the Case.

Respondents, in their opposing brief, state as follows:

> "A hearing on the accusation was held before a hearing officer who found seven separate instances where men on petitioner's premises solicited acts of homosexual intercourse with police officers, one of which instances included the touching of the police officer's private parts" (Resp. Opposing Br. p. 5, lines 8-13).

The sole question involved here is one of due process of law. Respondents' gratuitous statement as to the facts can only be for the purpose of creating an atmosphere of prejudice towards petitioner, with regard to the constitutional issue here present.

Petitioner agrees that homosexuality is a social and educational problem of importance to the community. The fact remains, the hearing officer in this case permitted incompetent testimony as to any acts outside of petitioner's premises and unknown to petitioner, which resulted in the revocation of petitioner's license.

Petitioner requests the Court to consider the constitutional issue here present on the grounds stated in the petition for writ of certiorari filed in this cause.

Respectfully submitted,

ROBERT M. MASLOW,
ALBERT E. ISENBERG,
DON LOWRY, and
RONALD H. FREEMOND,
Attorneys for Petitioner.

EXHIBIT "A."

November 22, 1957

Mr. William I. Sullivan
Clerk of the Supreme Court
State Building
San Francisco, California

Re: Hollywood Circle vs. Department of Alcoholic Beverage Control Second Civil No. 22095

Dear Sir:

It is our intention to file a petition for writ of certiorari with the Supreme Court of the United States. We should appreciate your advising the date on which the decision in the above entitled cause became final, and the last day to file the petition for writ of certiorari with the Supreme Court.

Your attention to this matter is sincerely appreciated.

Very truly yours,
DON LOWRY

DL:is

EXHIBIT "B."

San Francisco 2
315 State Building

Office of the Clerk
SUPREME COURT OF CALIFORNIA
William I. Sullivan, Clerk
November 25, 1957

Messrs. Fendler, Lerner & Lowry
Attorneys at law
333 So. Beverly Drive
Beverly Hills, California

Attention: Mr. Don Lowry

Re: 2 Civ. 22095—Hollywood Circle vs. Department of Alcoholic Beverage Control

Gentlemen:

Our records disclose that the District Court of Appeal of the Second Appellate District affirmed the judgment in the above case on September 3, 1957; that that court denied a rehearing on September 25, 1957; that this court denied a hearing in the case on October 30, 1957; and that the remittitur issued from the District Court of Appeal on November 4, 1957.

Inasmuch as this court denied a hearing the case never became our case and it is suggested that you communicate with the District Court of Appeal. Under the Rules on Appeal a decision of the District Court of Appeal becomes final in 60 days. As you know, a Petition for Writ of Certiorari or a Notice of Appeal to the Supreme Court of the United States may be filed within 90 days. I am not in a position to advise you as to when the 90-day period expires.

Very truly yours,
/s/ William I. Sullivan
William I. Sullivan
Clerk of the Supreme Court